STATE OF MICHIGAN

IN THE SUPREME COURT

J & J CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v.

BRICKLAYERS AND ALLIED CRAFTSMEN LOCAL 1 and MARK KING,

Defendants-Appellees.

/

Supreme Court No. 119357

Court of Appeals No. 215090

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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union Fund of Michigan is the Michigan affiliate of a nationwide nonpartisan organization of nearly 300,000 members dedicated to protecting rights guaranteed by the United States Constitution. The ACLU has long been committed to protecting the fundamental First Amendment rights of citizens to speak freely and to petition the government for a redress of grievances. The ACLU believes that debate on public issues should be uninhibited and robust. Accordingly, the ACLU believes that citizens who speak out at city council meetings are entitled to absolute immunity, or at a minimum, qualified immunity, from tort liability. Without such protection, public debate about governmental matters is stifled and our democracy suffers.

QUESTIONS PRESENTED

1. Whether the Petition Clause of the First Amendment to the United States Constitution protects statements made by a union representative before a city council, in a successful attempt to persuade the council not to award a public contract to a non-union contractor, from liability for tortious interference with a business expectancy?

The trial court answered: *No*.

The Court of Appeals answered: *Yes*.

The American Civil Liberties Union Fund of Michigan, as *amicus curiae*, answers: *Yes*.

2. Whether the Petition Clause of the First Amendment to the United States Constitution requires a private plaintiff, in order to recover damages for defamation, to prove that false statements made by a union representative before a city council, in an attempt to persuade the council not to award a public contract to the plaintiff, were made with actual malice rather than mere negligence?

The trial court answered: *No*.

The Court of Appeals answered: *Yes*.

The American Civil Liberties Union Fund of Michigan, as *amicus curiae*, answers: *Yes*.

STATEMENT OF FACTS[1]

This case arises from statements made to the Wayne City Council by defendant Mark King ("King"), acting on behalf of defendant Bricklayers and Allied Craftsmen, Local 1 ("the Union"),[2] at a City Council meeting in May 1995. At the meeting, King spoke against the award of a city construction contract to J&J Construction Co. ("J&J Construction" or "J&J").[3] Some of the statements King made about J&J Construction were later found by the trial court to be false, albeit only negligently so. Possibly as a result of King's statements, the City Council voted not to award the contract to J&J Construction.

J&J Construction is a non-union contractor. In early 1995, J&J submitted the lowest bid for the masonry work on the new Wayne Aquatic Center, a public facility planned by the City of Wayne. The City was required by law to award contracts to the lowest qualified bidder "*unless* the city council determined that the public interest would be better served by accepting a higher bid."[4] At the May 1995 City Council meeting, King appeared before the Council to oppose awarding the masonry contract to J&J. King told the Council that J&J did not pay the prevailing wage set by the State of Michigan. He also accused J&J of poor workmanship and showed the Council some photographs that, he alleged, depicted shoddy work done by J&J on a job at Novi High School. King

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[1] The following facts are taken in their entirety from the opinion of the Court of Appeals below, reported as *J&J Construction Co. v Bricklayers and Allied Craftsmen, Local 1*, 245 Mich App 722; 631 NW2d 52 (2001). The Court of Appeals noted that "[t]he material facts are not in dispute." 245 Mich App at 724; 631 NW2d at 44.

[2] Periodically throughout this Brief, defendants King and the Union are referred to collectively as "Appellees."

[3] Periodically throughout this Brief, plaintiff J&J Construction is referred to as "Appellant."

[4] 245 Mich App at 724; 631 NW2d at 44 (quoting Wayne City Attorney) (emphasis added).

questioned whether J&J had the ability to perform the contract and to do so in a timely manner. He also commented to the Council that J&J "is a non-union contractor and this is a union town."[5]

Following King's remarks, the City Council voted to table the decision whether to award the masonry contract to J&J Construction. At a meeting the next month, the Council voted to reject J&J's bid "because of concerns about faulty workmanship and failure to pay prevailing wage and benefits."[6]

As subsequent testimony in the trial court revealed, not all of King's statements to the City Council about J&J Construction were well-founded. King "conceded that he knew of no job that [J&J] had not finished on time."[7] He admitted that he had not taken steps to verify his accusation that J&J did not pay the prevailing wages and benefits, although the trial court concluded that J&J had not proved that accusation false. Other trial witnesses, including an expert, testified that J&J's work at Novi High School was not below par as King had claimed.

After losing the Wayne Aquatic Center contract, J&J Construction brought claims of defamation and tortious interference with a business expectancy against King and the Union. After a bench trial, the trial court found that J&J had failed to prove that King's statements to the City Council concerning the prevailing wage and benefits were false. The court found, however, that King's statements concerning the quality of J&J's workmanship were false, that King had been negligent in making them, and that King had acting on behalf of the Union when he spoke before the Council. The trial court thus held both King and the Union liable for defamation and interference

[5] 245 Mich App at 725; 631 NW2d at 44 (quoting King's testimony).
[6] 245 Mich App at 724; 631 NW2d at 44.
[7] 245 Mich App at 725; 631 NW2d at 44.

with a business expectancy. Finding that J&J's business reputation had not been harmed, however, the trial court awarded damages only for J&J's lost profit from the rejected bid—$57,888—plus $104,286.95 in costs and attorneys' fees and $26,044.51 in interest.

The Court of Appeals reversed the finding of liability for defamation and vacated the finding of liability for tortious interference, remanding the latter for "reevaluation of the evidence."[8] The Court of Appeals held that the Petition Clause of the First Amendment to the United States Constitution immunized King's statements from liability for tortious interference.[9] The Court also held that the Petition Clause rendered King's statements qualifiedly immune from defamation liability, requiring proof of actual malice rather than mere negligence.[10] The Court of Appeals thus remanded the defamation claim for a reevaluation of the evidence under the actual-malice standard.

[8] 245 Mich App at 743; 631 NW2d at 53.
[9] 245 Mich App at 727-35; 631 NW2d at 45-50.
[10] 245 Mich App at 739-4; 631 NW2d at 51-53.

SUMMARY OF ARGUMENT

The Petition Clause of the First Amendment confers absolute immunity against non-defamation tort liability upon citizens who approach their government to seek action. In *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127; 81 S Ct 523; 5 L Ed 2d 464 (1961), and *United Mine Workers v Pennington*, 381 US 65; 85 S Ct 1585; 14 L Ed 626 (1965), the United States Supreme Court held that petitioning activity is immune from liability under federal antitrust statutes. More than just a rule of antitrust law, the *Noerr-Pennington* doctrine is a principle of *constitutional* law that has since been applied to protect petitioning activity from a wide range of statutory and common law claims, including claims of tortious interference like the one at issue in the instant case. See, e.g., *Arim v General Motors Corp.*, 206 Mich App 178, 520; NW2d 695 (1994), *app. denied*, 448 Mich 873; 530 NW2d 750 (1995)[11] (applying *Noerr-Pennington* to claims of tortious interference with business relations, fraud, injurious falsehood, intentional infliction of emotional distress, and abuse of process); *Azzar v Primebank, F.S.B.*, 198 Mich App 512, 517; 499 NW2d 793, 796 (1993), *app. denied*, 443 Mich 858; 505 NW2d 581 (1993) (applying *Noerr-Pennington* to claim of breach of fiduciary duty); *Video International Production, Inc., v Warner-Amex Cable Comunications, Inc.*, 858 F2d 1075, 1084 (5th Cir 1988), *cert. denied*, 491 US 906 (1989) (applying *Noerr-Pennington* to claims of tortious interference with contract and § 1983 civil rights violations); *Sessions Tank Liners, Inc. v Joor Manufacturing, Inc.*, 17 F3d 295, 301-02 (1994),

[11] Citations to denials of appeal or certiorari will be given in the first instance at which a decision is cited in this Brief and will be omitted thereafter.

cert. denied, 513 US 813 (1994) (applying *Noerr-Pennington* to claim of tortious interference with prospective economic advantage).

While the Supreme Court has recognized a so-called "sham" exception to *Noerr-Pennington* immunity, that exception does not apply where, as in the instant case, a defendant makes "a *genuine* effort to influence" government decisionmaking. *Noerr*, 365 US at 144, 81 S Ct at 533; see also *City of Columbia v Omni Outdoor Advertising, Inc.*, 499 US 365, 380; 111 S Ct 1344; 1354 (1991).[12] Nor does the "sham" exception apply where, as here, a defendant's efforts to influence government action have proven *successful*. See *Noerr*, 365 US at 144, 81 S Ct at 533; *Azzar*, 198 Mich App at 520, 499 NW2d at 797; *Video International*, 858 F2d at 1082-83; *Potters Medical Center v City Hospital Association*, 800 F2d 568, 578 (6th Cir 1986); *Stern v United States Gypsum, Inc.*, 547 F2d 1329, 1345 (7th Cir 1977), *cert. denied*, 43 US 975 (1977). And the Supreme Court has held that neither a defendant's *motive* for petitioning the government, nor the *means* a defendant employs in doing so, are relevant to *Noerr-Pennington* immunity. See *Noerr*, 365 US at 139; 81 S Ct at 530-31 (motive irrelevant); *Pennington*, 381 US at 669-70, 95 S Ct at 1593 (same); *City of Columbia*, 499 US at 381; 111 S Ct at 1354 (same); *BE&K Construction Co. v National Labor Relations Board*, 122 S Ct 2390, 2396 (2002) (same); *City of Columbia*, 499 US at 380; 111 S Ct at 1354 (means irrelevant); see also *Azzar*, 198 Mich App at 517-18 (knowing falsehoods irrelevant), 499 NW2d at 796; *Stern*, 547 F2d at 1345 (same).

[12] All emphasis in quotations is added in this Brief unless otherwise indicated.

The "commercial" exception to *Noerr-Pennington* ostensibly recognized by two early federal Court of Appeals decisions—*George R. Whitten, Jr., Inc. v Paddock Pool Builders, Inc.*, 424 F2d 25 (1st Cir 1970), *cert. denied*, 400 US 850 (1970), and *Hecht v Pro-Football, Inc.*, 444 F2d 931, 940-42 (D.C. Cir 1971), *cert. denied*, 404 US 1047 (1972)—has not been adopted by other federal circuits or endorsed by the Supreme Court. This is because the *Whitten* and *Hecht* decisions are flawed in three respects. First, they rest upon a confusion between *Noerr-Pennington* and a separate line of decisions conferring limited immunity upon state governments. Second, they erroneously deny First Amendment protection to citizens' efforts to influence "commercial" decisions by their government. And third, they presuppose a nonexistent line between "commercial" and "political" government decisions. As such, the Court of Appeals in the instant case was correct not to credit their holdings.

While citizens are absolutely immune from most tort claims arising from their exercise of the petition right, the Supreme Court has held that they are *qualifiedly* immune from defamation claims. See *White v Nicholls*, 44 US (3 How) 266; 11 L Ed 591 (1845); *McDonald v Smith*, 472 US 479; 105 S Ct 2787; 86 L Ed 2d 384 (1985). In a defamation case based upon the defendant's petitioning activity, the plaintiff must prove that the defendant acted with *actual malice*, not merely with negligence. Under the standard of *New York Times Co. v Sullivan*, 376 US 254, 279-80; 84 S Ct 710, 726 (1964), this means that the plaintiff must prove that the defendant's alleged defamatory statements were made "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." As such, although petitioning efforts are not absolutely shielded from

defamation liability, they are "fully protected by the actual-malice standard set forth in *New York Times*." *McDonald*, 472 US at 490, 105 S Ct at 2794 (Brennan, J., concurring).

In the case at bar, therefore, the Court of Appeals was entirely correct to dismiss the plaintiff's tortious interference claim and to remand for a new trial to determine whether the defendant's alleged defamatory statements were made with actual malice.

ARGUMENT

I. THE UNFETTERED RIGHT TO PETITION THE GOVERNMENT IS VITAL TO A SYSTEM OF PARTICIPATORY DEMOCRACY.

The First Amendment to the federal Constitution guarantees "the right of the people ... to petition the Government for a redress of grievances."[13] As the United States Supreme Court repeatedly has affirmed, the right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers v Illinois State Bar Association*, 389 US 217, 222; 88 S Ct 353, 356; 19 L Ed 2d 426 (1967), one that "is implicit in '[t]he very idea of government, republican in form,'" *McDonald v Smith*, 472 US 479, 482; 105 S Ct 2787, 2789 (1985) (quoting *United States v Cruikshank*, 92 US (2 Otto) 542, 552; 23 L Ed 588 (1876)).[14]

For the American Founders, the right to petition was a fundamental political freedom—nearly as important as the right to vote and equal in importance to the right of free speech.[15] By the time our Constitution was framed, the pedigree of the petition right was already well established. As the Supreme Court has explained:

> The historical roots of the Petition Clause long antedate the Constitution. In 1689, the Bill of Rights exacted of William and Mary stated: "[I]t is the Right of the

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[13] The Michigan Constitution contains a similar provision: "The people have the right ... to instruct their representatives and to petition the government for redress of grievances." Mich Const. Art. 1, § 3.

[14] See also, e.g., *BE&K Const. Co. v N.L.R.B.*, 122 S Ct 2390, 2396 (2002) ("We have recognized this right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights' ... ."); *Eastern R.R. Presidents Conf. v Noerr Motor Freight, Inc.*, 365 US 127, 138; 81 S Ct 523, 530 (1961) ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.").

[15] See Larry D. Kramer, *Foreword: We the Court,* 115 Harv L. Rev 4, 27 (2001) ("First and foremost [in pre-Revolution America] was the right to vote ... . Next in importance ... was the right to petition, together with its companion, the right of free speech.").

> Subjects to petition the King." ... This idea reappeared in the Colonies when the Stamp Act Congress of 1765 included a right to petition the King and Parliament in its Declaration of Rights and Grievances. ... And the Declarations of Rights enacted by many state conventions contained a right to petition for redress of grievances. [*McDonald*, 472 US at 482-83; 105 S Ct at 2790 (citations omitted).[16]]

The Founders thought the right to petition so important that they appealed to it in the closing sentences of the Declaration of Independence: "In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury."

The Founders recognized, and the modern Supreme Court consistently has reaffirmed, that the importance of the petition right derives from its centrality to the idea of democratic government itself. "In a representative democracy such as this, ... the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127, 137; 81 S Ct 523, 529 (1961). "The Petition Clause ... was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *McDonald,* 472 US at 485; 105 S Ct at 2791. Thus "the values in the right of petition as an important aspect of self-government are beyond question." *McDonald*, 472 US at 483; 105 S Ct at 2790.

Petitioning the government, however, is not just political speech; it is a special kind of political speech, "a *particular* freedom of expression" designed to protect citizens' ability to "communicate their will" directly to government officials. *McDonald*, 472 US at 482; 105 S Ct at

[16] See also Kramer, *supra* note _Ref52650969315, at 27 (describing American use of petitions to resist Stamp Act).

2789 (quoting James Madison). The First Amendment, after all, lists the freedoms of speech, press, assembly, and petition as *separate* (if related) freedoms, each with its own individual significance. "The Framers envisioned the rights of speech, press, assembly, and petitioning as interrelated components of the public's exercise of its sovereign authority." *McDonald*, 472 US at 489; 105 S Ct at 2793 (Brennan, J., concurring). As such, private activity in the context of petitioning the government is entitled to special protection that the same activity in another context would not be entitled to. For example, the Supreme Court has held that speech intended to restrain trade is immune from antitrust liability when it is directed to the government as a means of procuring government action. See *Noerr Motor Freight,* 365 US at 135-38; 81 S Ct at 528-30; *United Mine Workers v Pennington*, 381 US 657; 85 S Ct 1585; 14 L Ed 626 (1965); *California Motor Transport Co. v Trucking Unlimited,* 404 US 508; 92 S Ct 609; 30 L Ed 2d 642 (1972); *BE&K Construction Co. v National Labor Relations Board*, 122 S Ct 2390 (2002). The justification for the enhanced protection afforded petitioning activity parallels the reason behind the qualified immunity the Court has conferred upon criticism of public officials and public figures: It "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *McDonald,* 472 US at 485-86, 105 S Ct at 2791 (Brennan, J., concurring) (quoting *New York Times Co. v Sullivan,* 376 US at 270, 84 S Ct at 721).

Of course, the right to petition is not limited to direct and formal requests for government action. It "governs the approach of citizens or groups of them ... to all departments of the Government," *California Motor Transport*, 404 US at 510; 92 S Ct at 612, whatever form that

"approach" might take. So, for instance, the right to petition covers not only written letters to government officials (see, e.g., *McDonald,* 472 US 479; 105 S Ct 2787; 86 L Ed 2d 384) and the filing of court pleadings (see, e.g., *BE&K Construction,* 122 S Ct 2390), but also meetings and informal communications with regulatory officials (see, e.g., *Pennington,* 381 US at 660-61; 85 S Ct at 1588; *Video International,* 858 F2d at 1079-80; *E.W. Wiggins Airways, Inc. v Massachusetts Port Authority*, 362 F2d 52, 54-55 (1966), *cert. denied*, 385 US 947 (1966)), contract negotiations with public entities (see, e.g., *Wiggins,* 362 F2d at 54-55; *Greenwood Utilities Commission v Mississippi Power Co.,* 751 F2d 1484 (1985)), and the kind of conduct engaged in by Appellees in the instant case: statements made at hearings of local legislative bodies (see, e.g., *Video International Production, Inc. v Warner-Amex Cable Communications, Inc.*, 858 F2d 1075, 1079 (5th Cir 1988)). Even a "publicity campaign" designed to influence government decisionmaking has been protected by the Supreme Court as an exercise of the petition right. See *Noerr,* 365 US at 140-41; 81 S Ct at 531. In short, the Petition Clause protects all "private action that is ... genuinely aimed at procuring favorable government action." *Allied Tube & Conduit Corp. v Indian Head, Inc.*, 468 US 492, 500 n.4; 108 S Ct 1931, 1937 n.4 (1988).[17]

The special nature of the right to petition, and its centrality to the idea of representative democracy, have given rise to a rule of absolute immunity from legal liability for the exercise of that right, as we explain in Part II, below. And, as we note in Part III, the single, limited exception to this blanket immunity—inapplicable in the case at bar—arises in the context of actions for defamation,

[17] Of course, the Petition Clause, as part of the First Amendment, is applicable not only to the federal government but also to state and local governments through the Fourteenth Amendment. See *New York Times Co. v Sullivan*, 376 US 254, 276-77; 84 S Ct 710, 724 (1964) (and decisions cited therein).

where the Supreme Court has recognized a qualified privilege for defamation that does not reflect "actual malice."

II. AN EXERCISE OF THE PETITION RIGHT IS ABSOLUTELY IMMUNE FROM NON-DEFAMATION TORT LIABILITY.

When a private individual or group engages in speech or conduct (other than defamation) that is directed to the government and designed to influence government action, the Petition Clause immunizes that conduct from liability under federal or state law, even if that speech or conduct would be actionable in some other context. This is because "the very existence of a tort action for the seeking of valid governmental action exerts an undesirable chilling effect" on those seeking to influence the government. *Sessions Tank Liners, Inc. v Joor Manufacturing, Inc.*, 17 F3d 295, 302 (9th Cir 1994). Deterring would-be petitioners from making their wishes known would "deprive the government of a valuable source of information," *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127, 139; 81 S Ct 523, 531 (1961), and undermine the very premise of representative democracy: that "'[t]he people, not the government, possess the absolute sovereignty,'" *New York Times Co. v Sullivan*, 376 US 254, 274; 84 S Ct 710, 723 (1964) (quoting James Madison). "[E]xcept in the most extreme circumstances citizens cannot be punished for exercising [the petition] right 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.'" *McDonald v Smith*, 472 US 479, 486; 105 S Ct 2787, 2792 (1985) (Brennan, J., concurring). As Justice Scalia observed, with some understatement, while writing for the Court in *City of Columbia v Omni Outdoor Advertising, Inc.*,

499 US 365, 379; 111 S Ct 1344, 1353 (1991), penalizing citizens for urging "lawful state action" would be "obviously peculiar in a democracy."

The Supreme Court first recognized legal immunity for petitioning activity in *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127; 81 S Ct 523; 5 L Ed 2d 464 (1961), where it refused to impose federal antitrust liability for efforts by the railroad industry to secure the enactment and enforcement of laws that would hinder competition from the trucking business. The principle of *Noerr* was later reaffirmed in *United Mine Workers v Pennington*, 381 US 657; 85 S Ct 1585; 14 L Ed 626 (1965). While the so-called *Noerr-Pennington* doctrine formally turned on the interpretation of the federal antitrust statutes, it had clear constitutional underpinnings. As the Court noted in a subsequent decision, "[w]e rested our decision [in *Noerr*] on two grounds":

> (1) "In a representative democracy such as this, the[] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. ..."
>
> (2) "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."

California Motor Transport Co. v Trucking Unlimited, 404 US 508, 510; 92 S Ct 609, 611 (1972) (quoting *Noerr*, 365 US at 137-38; 81 S Ct at 530); see also *BE&K Construction Co. v National Labor Relations Board*, 122 S Ct 2390, 2396 (2002) (*Noerr* decision was "based ... in part on the principle that we would not 'lightly impute to Congress an intent to invade ... freedoms' protected by the Bill of Rights, such as the right to petition.").[18]

[18] Other courts, including those of Michigan, also have acknowledged the constitutional basis of the *Noerr-Pennington* doctrine. See, e.g., *Potters Med. Ctr. v City Hospital Ass'n,* 800 F2d 568, 578 (6th Cir 1986) (*Noerr-Pennington* doctrine "rests on two grounds: the First Amendment's protection of the right to petition the government,

Thus "the *Noerr-Pennington* doctrine is a principle of constitutional law," *Azzar v Primebank, F.S.B.*, 198 Mich App 512, 517; 499 NW2d 793, 796 (1993), and not simply a rule of federal antitrust law. As such, it has been applied broadly, outside the antitrust context, to generally "bar[] litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs." *Id.* So, for example, courts in Michigan and elsewhere have insulated petitioning activity from liability for violations of civil rights under 28 USC § 1983, see, e.g., *Video International Production, Inc., v Warner-Amex Cable Comunications, Inc.*, 858 F2d 1075, 1084 (5th Cir 1988); for breach of fiduciary duty, see, e.g., *Azzar*, 198 Mich App 512; 499 NW2d 793; for fraud, injurious falsehood, intentional infliction of emotional distress, and abuse of process, see, e.g., *Arim v General Motors Corp.*, 206 Mich App 178; 520 NW2d 695 (1994); and for tortious interference with contract, with advantageous business relationship, with prospective economic advantage, and related causes of action like the one asserted by Appellant in the instant case, see, e.g., *id.*; *Video International*, 858 F2d at 1084-85; *Sessions Tank Liners, Inc. v Joor Manufacturing, Inc.*, 17 F3d 295, 301-02 (1994). As the Michigan Court of Appeals has held, "'[t]here is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as

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and the recognition that a representative democracy ... depends upon the ability of the people to make known their views and wishes to the government."); *In re Airport Car Rental Antitrust Litigation*, 693 F2d 84, 86 (9th Cir 1982), *cert. denied sub nom Budget Rent-A-Car of Washington-Oregon, Inc. v Hertz Corp.*, 462 US 1133 (1983) ("The twin pillars upholding the *Noerr-Pennington* doctrine are: (1) the vital role played by free-flowing communication in a representative democracy, and (2) the first amendment right to petition the government for the redress of grievances."); *Arim v General Motors Corp.*, 206 Mich App 178, 189; 520 NW2d 695, 700 (1994) (quoting *Potters Med. Ctr.*, supra); *Azzar v Primebank, FSB,* 197 Mich App 512, 517; 499 NW2d 793, 796 (1993) ("[T]he *Noerr-Pennington* doctrine is a principle of constitutional law ....").

antitrust.'" *Arim*, 206 Mich App at 191; 520 NW2d at 701 (quoting *Video International*, 858 F2d at 1084).

Pursuant to the *Noerr-Pennington* doctrine, then, the Petition Clause prohibits tort lawsuits which, like that brought by J&J Construction in the instant case, derive from a defendant's attempts to persuade the government to make a particular decision or take a particular course of action.[19] In the litigation at bar, it is undisputed that Appellees' actions were designed to persuade the Wayne City Council to make a particular decision—namely a vote to reject J&J Construction's bid to perform the masonry work on the Aquatic Center. Under *Noerr-Pennington*, the Petition Clause thus precludes J&J's claim for interference with a business expectancy. See *Arim*, 206 Mich App 178; 520 NW2d 695 (applying *Noerr-Pennington* to bar a claim for tortious interference with advantageous business relationship); *Video International*, 858 F2d at 1084 (applying *Noerr-Pennington* to bar a claim for tortious interference with contractual relations).[20]

Outside of defamation claims, the Supreme Court has recognized only a single exception to the *Noerr-Pennington* rule that petitioning activity is absolutely immunized from legal liability: the so-called "sham" exception. In *Noerr*, the Court acknowledged that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 US at 144; 81 S Ct at 533. By the Court's own terms in *Noerr*, however, the "sham" exception does not apply where a defendant makes "a *genuine* effort

[19] Again, the limited exception arises in the context of defamation actions, which we discuss in Part III, below.

[20] *Cf. Sessions Tank Liners*, 17 F3d at 301-02 (avoiding federal constitutional question by construing California law to immunize petitioning activity from liability for tortious interference with prospective economic advantage).

to influence" government decisionmaking. *Id.* As the Court has since clarified, the "sham" exception

> encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. ... A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, ... not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means*.'" *[City of Columbia v Omni Outdoor Advertising, Inc.*, 499 US 365, 380; 111 S Ct 1344, 1354 (1991) (quoting *Allied Tube & Conduit Corp. v Indian Head, Inc.*, 486 US 492, 500 n.4; 108 S Ct 1931, 1937 n.4; 100 L Ed 497 (1988)) (citations omitted; emphasis in original).]

In other words, the "sham" exception to *Noerr-Pennington* applies only when the defendant does not genuinely seek some government decision as the result of its petition—"when the party petitioning the government is not at all serious about the object of that petition, but engages in the petitioning activity merely to inconvenience" the plaintiff. *Arim*, 206 Mich App at 190; 520 NW2d at 189 (quoting *Video International*, 858 F2d at 1082). But where, as in the instant case, the defendant undisputedly sought actually to influence government action, the petitioning is not a "sham" and is protected from liability by *Noerr-Pennington*.[21]

Indeed, the courts have uniformly held, in the words of the Michigan Court of Appeals, that "the sham exception is inapplicable when"—as in the instant case—"petitioning efforts are *successful*." *Azzar*, 198 Mich App at 520; 499 NW2d at 797. See also *Noerr*, 365 US at 144; 81 S Ct at 533 ("sham" petitioning "is not the case here" where defendants' effort to procure government

[21] See also, e.g., *Potters Medical Center v City Hospital Association*, 800 F2d 568, 579 (6th Cir 1986); *Stern v United States Gypsum, Inc.*, 547 F2d 1329, 1344-45 (7th Cir 1977).

action "was not only genuine but also highly successful"); *Video International*, 858 F2d at 1082-83 (finding of *Noerr-Pennington* immunity "is supported by the fact that [defendant] succeeded in attaining its goal" of government action); *Potters Medical Center v City Hospital Association*, 800 F2d 568, 578 (6th Cir 1986) ("The conclusion that City Hospital did not engage in a 'sham' by participating in this administrative process is reinforced by the very fact that its position prevailed."); *Stern v United States Gypsum, Inc.*, 547 F2d 1329, 1345 (7th Cir 1977) ("Just as in *Noerr*, the fact of defendants' success in obtaining what they sought further attests to the genuineness of the endeavor."). This rule makes good sense, for "First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subject to ... liability for his success." *Greenwood Utilities Commission v Mississippi Power Co.*, 751 F2d 1484, 1505 (5th Cir 1985). Petitioning efforts can hardly be a "sham" if they are meritorious enough to convince a public body to act on them. Moreover, to subject a citizen to liability for successful petitioning would be to punish that citizen for something the *government* has done—surely, in Justice Scalia's words, a result that is "peculiar in a democracy." *City of Columbia*, 499 US at 379; 111 S Ct at 1353.

Nor is a defendant's *motive* for seeking government action relevant to its immunity from liability under the Petition Clause. The *Noerr* decision itself squarely rejected the contention that a defendant's motive or purpose to harm the plaintiff, or to serve the defendant's own self-interest, removes his or her petitioning activity from immunity:

> The right of the people to inform their representatives in government with respect to the passage or enforcement of laws cannot properly be made to depend upon their

> intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. ... Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. *[Noerr*, 365 US at 139; 81 S Ct at 530.]

To subject citizens to liability for self-interested petitioning, the Court observed,

> would disqualify people from taking a public position on matters in which they are financially interested [and] would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. [*Id.*]

The Court has since repeatedly confirmed that a defendant's motive is irrelevant to Petition Clause immunity. See *Pennington*, 381 US at 669-70; 85 S Ct 1593; *BE&K Construction Co. v National Labor Relations Board*, 122 S Ct 2390, 2396 (2002); *City of Columbia*, 499 US at 381; 111 S Ct at 1354.[22]

Indeed, a citizen's petitioning efforts are immune from liability regardless of the *means* he or she may have used to persuade the government. As the Supreme Court has held, the Petition Clause protects even "one 'who "genuinely seeks to achieve his governmental result, but does so *through improper means*."'" *City of Columbia*, 499 US at 380, 1354 (quoting *Allied Tube*, 486 US at 500 n.4; 108 S Ct at 1937 n.4)) (emphasis in original). Thus even "*knowing* falsehoods are generally protected from liability under the First Amendment right to petition." *Azzar*, 198 Mich

[22] "[T]he very existence of a tort action for the seeking of valid governmental action exerts an undesirable chilling effect on the access of others to government, regarldess of the motives of the particular party before the court." *Sessions Tank Liners*, 17 F3d at 302. See also, e.g., *Potters*, 800 F2d at 579 (intent not relevant to *Noerr-Pennington* immunity); *Stern*, 547 F2d at 1343 (same); *Hecht v Pro-Football, Inc.*, 444 F2d 931, 940 (D.C. Cir 1971) (same).

App at 517-18; 499 NW2d at 796; see also *Stern*, 547 F2d at 1345.[23] The Michigan Court of Appeals has explained the rationale for this rule:

> [C]itizens would be deterred from petitioning the government if that were not so. Because plaintiffs may easily allege that defendants knowingly and maliciously made false accusations, protecting such knowingly and maliciously made allegations provides breathing space for the First Amendment right to petition the government. [*Azzar*, 198 Mich App at 518, 499 NW2d at 796 (citations omitted).]

A citizen who fears unfounded allegations of knowing falsehood may be deterred from exercising his or her right to petition at all, thus depriving the government of potentially valuable information and eviscerating the very notion of popular sovereignty. So, "while false statements may be unprotected for their own sake, '[t]he First Amendment requires that we protect some falsehood in order to protect *speech that matters*.'" *BE&K Construction*, 122 S Ct at 2399 (quoting *Gertz v Robert Welch, Inc.*, 418 US 323, 341; 94 S Ct 2997; 41 L Ed 2d 789 (1974)) (emphasis in original).

Outside of defamation claims, then, petitioning activity is absolutely protected from legal liability—regardless of the motive behind the petitioning or the means used to accomplish it—so long as the petitioning is not a "mere sham," that is, an effort simply to harass the plaintiff without any real intent to influence government action. And it is important to note that the "sham" exception is the *only* exception to *Noerr-Pennington* immunity for non-defamation claims. Two federal Courts of Appeals decisions (rendered in 1970 and 1971, respectively) that purported to recognize an additional "commercial" exception to *Noerr-Pennington* were erroneous and have not been followed by other courts. In *George R. Whitten, Jr., Inc. v Paddock Pool Builders, Inc.*, 424 F2d 25 (1st Cir 1970), the First Circuit held that *Noerr-Pennington* immunizes only petitioning activity directed to

[23] Again, the exception arises in claims alleging defamation. See infra Part III.

"public officials vested with significant policymaking discretion" rather than "public officials engaged in purely commercial dealings." *Id.* at 33. The reasoning of *Whitten* was adopted shortly thereafter by the District of Columbia Circuit in *Hecht v Pro-Football, Inc.*, 444 F2d 931, 940-42 (D.C. Cir 1971).[24]

But the *Whitten* and *Hecht* decisions rested upon a confusion between the *Noerr-Pennington* doctrine and another, entirely distinct line of Supreme Court case law involving so-called "*Parker* immunity," which protects *state governments—not* their citizens—from tort liability.[25] The question whether a government decision is "political" or purely "commercial" *is* relevant to *Parker* immunity; it is *not* relevant to *Noerr-Pennington*. *Parker* immunity comes from *Parker v Brown*, 317 US 341; 63 S Ct 307; 87 L Ed 315 (1943), where the Supreme Court held that "the federal antitrust laws do not prohibit a State 'as sovereign' from imposing certain anticompetitive restraints 'as an act of government.'" *City of Lafayette v Louisiana Power & Light Co.*, 435 US 389, 391; 98 S Ct 1123, 1125; 55 L Ed 2d 354 (1978) (quoting *Parker*). The idea is that state *governments* (and, under some circumstances, their political subdivisions, see *City of Columbia*, 499 US at 370; 111 S Ct at 1349) should not be subject to antitrust liability for considered public policy decisions, made in their

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[24] The reasoning of *Whitten* has also been adopted by the Supreme Court of Virginia. See *Lockheed Info. Mgmt. Syst.. Co. v. Maximus, Inc.*, 524 SE2d 420, 427 (Va. 2000). In relying on *Whitten*, the court in *Lockheed* implicitly incorporated *Whitten*'s erroneous conflation of *Noerr-Pennington* immunity with *Parker* immunity, which we explain below. In addition, the *Lockheed* court, like those in *Whitten* and *Hecht*, misconstrued the principles behind the *Noerr-Pennington* doctrine in an attempt to distinguish "commercial" petitioning of government from "political" petitioning of government. See *id.* We discuss this confusion below as well.

The *Lockheed* decision was misguided for the same reasons that the *Whitten* decision, as we explain below, was misguided.

[25] See *In re Airport Car Rental Antitrust Litigation*, 693 F2d 84, 87-88 (9th Cir 1982) (distinguishing between *Noerr-Pennington* and *Parker* immunities); *cf. City of Columbia*, 499 US at 369-84; 111 S Ct at 1348-56 (evaluating *Parker* and *Noerr-Pennington* as separate doctrines).

sovereign capacity, designed to produce anticompetitive effects. The corollary is that *Parker* immunity "does not necessarily obtain where the State acts *not* in a regulatory capacity but as a commercial participant in a given market." *City of Columbia*, 499 US at 374-75; 111 S Ct at 1351.

The *Parker* doctrine, however, is a principle of federal *antitrust* law, not of federal *constitutional* law; unlike *Noerr-Pennington*, it has nothing to do with the Petition Clause. Because it is a matter of federal antitrust policy, *Parker* immunity can be abrogated where it is inconsistent with that policy—as, for example, where a state or local government is essentially acting like a private competitor and therefore not entitled to the deference accorded a sovereign. Thus the question of the nature of a state government's action—"political" or "purely commercial"—is relevant under *Parker*. The decisions in *Whitten* and *Hecht*, however, mistakenly applied that distinction in cases involving *Noerr-Pennington* immunity, which is a "very different doctrine," *In re Airport Car Rental Antitrust Litigation*, 696 F2d 84, 87 (9th Cir 1982). *Noerr-Pennington* "is a principle of *constitutional* law," *Azzar*, 198 Mich App at 517; 499 NW2d at 786, not of antitrust law; it immunizes not the sovereign prerogatives of government, but rather the ability of *citizens themselves* "to make their wishes known to their representatives" in government, *Noerr*, 365 US at 137; 81 S Ct at 529. And a citizen's right to petition his or her government—like the freedom of political speech more generally—in no way depends on whether the government action that citizen seeks can be characterized as "political" or as "commercial." "It is undisputed that the first amendment protects efforts to influence officials making essentially commercial decisions on behalf of a governmental entity," *Airport Car Rental*, 693 F2d at 87, just as it protects efforts to influence

officials making "policy" decisions.[26] As such, the question asked by the courts in *Whitten* and *Hecht*—whether a sought-after government decision is "commercial" or "political"—is, properly understood, simply irrelevant to Petition Clause jurisprudence.

Indeed, that question is close to being nonsensical, for it is impossible to draw the clear line between "commercial" and "policymaking" decisions that the *Whitten* and *Hecht* decisions presuppose. The facts of the case at bar illustrate the almost inevitable overlap between the "commercial" and the "political" in government decisionmaking. It is true that, in a sense, the Wayne City Council was making a "commercial" decision when it decided which masonry bid for the new Aquatic Center to accept. But that decision unquestionably had "policy" dimensions as well. The Council's determination of how much public money to spend on masonry work also determined the amount of money that would be available for other features of the Aquatic Center. More generally, decisions about spending on the Aquatic Center determined the amount of money that would be available for other City projects of benefit to the public. It is a "policy" decision to spend money on a public Aquatic Center rather than, for example, on the public library, or on road repair, or on additional police or fire services. It is a "policy" decision, also, to hire or refuse to hire a particular contractor based upon perceptions of the quality of that contractor's work. And, perhaps most directly to the point here, it is a "policy" decision to hire or refuse to hire a contractor based in part upon that contractor's labor practices. The Wayne City Council surely was entitled to consider whether contracting with a non-union employer would serve or frustrate the City's public

[26] See *also Stern*, 547 F2d at 1343 ("It matters not [for purposes of *Noerr-Pennington* immunity] that the subject of the grievance may not be political, in the sense of raising public policy issues ... . [E]ven if it were not, First Amendment protections apply.").

policy goals. This indeed is the import of the city attorney's testimony in the trial court "that, as a matter of municipal law, the city was obligated to award contracts to the lowest qualified bidder meeting specifications *unless the city council determined that the public interest would be better served* by accepting a higher bid." 245 Mich App 722, 724; 631 NW2d 42, 44. That in fact is precisely what the City Council determined—surely a decision of policy, despite (and perhaps partly because of) its commercial implications.

In addition to its "commercial" aspects, then, the Wayne City Council's decision to reject J&J Construction's bid was, in significant part, a "policy" decision. This fact distinguishes the instant case from *Whitten*, in which the government decision at issue was described by the court as merely "a technical decision about the best kind of weld to use in a swimming pool gutter." *Whitten*, 424 F2d at 32. More fundamentally, however, it demonstrates the underlying fallacy of the so-called "commercial" exception to the *Noerr-Pennington* doctrine adopted in *Whitten* and *Hecht*. To some extent, virtually every government decision will have policy implications; there is no such thing as a "purely commercial" government decision. Denying immunity for petitioning activity that produces "commercial" activity by the government thus would penalize citizens for "mak[ing] their wishes known to their representatives," *Noerr*, 365 US at 137, 81 S Ct at 529, on issues that, like everything the government does, ultimately are matters of public policy—a negation of the very core of the First Amendment freedoms that *Noerr-Pennington* immunity is designed to protect.

As such, the far better rule—the one that gives full effect to the Petition Clause and avoids confusing the *Noerr-Pennington* doctrine with the distinct *Parker* line of cases—is simply that

"[t]here is no commercial exception to *Noerr-Pennington*." *Airport Car Rental*, 693 F2d at 88. Indeed, the Supreme Court has never endorsed such an exception, and two other federal Courts of Appeals have, in more recent opinions, expressly rejected it. See *Airport Car Rental*, 693 F2d at 87-88; *Greenwood Utilities Commission v Mississippi Power Co.*, 751 F2d 1484, 1505 n.14 (5th Cir 1985) ("We agree with the Ninth Circuit that there should be no commercial exception to *Noerr-Pennington* ... .").[27]

The Court of Appeals thus was correct to dismiss Appellant's claim of tortious interference with a business expectancy. Appellees' statements before the Wayne City Council are absolutely immune from such claims pursuant to the Petition Clause as implemented by the *Noerr-Pennington* doctrine.

III. DEFAMATION LIABILITY FOR PETITIONING ACTIVITY REQUIRES PROOF OF "ACTUAL MALICE."

The sole exception to the rule of blanket immunity for petitioning activity is liability for defamation. For defamation claims, the constitutional rule—endorsed by the U.S. Supreme Court in two separate decisions—is that the plaintiff, in order to recover damages for the defendant's exercise of the petition right, must prove that the defendant's statements were "made with '*actual malice*'—that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *New York Times Co. v Sullivan*, 376 US 254, 279-80; 84 S Ct 710, 726 (1964).

[27] By its decision in the *Greenwood Utilities* case, the Fifth Circuit disavowed a reading of its language in an earlier case, *Woods Exploration and Producing Co. v Aluminum Co. of America*, 438 F2d 1286, 1294-96 (5th Cir 1971), *cert. denied*, 404 US 1047 (1972), that had suggested endorsement of the "commercial" exception. See *Greenwood Utilities*, 751 F2d at 1505 n.14 ("Although some have suggested that our own decision in *Woods Exploration* ... espoused the commercial exception, we think that such a characterization is erroneous.").

"[E]xpression falling within the scope of the Petition Clause" thus is "fully protected by the actual-malice standard set forth in *New York Times Co. v Sullivan*." *McDonald v Smith*, 472 US 479, 490; 105 S Ct 2787, 2794 (1985) (Brennan, J., concurring).

The Supreme Court has held that petitioning activity, while protected from liability for other torts (as explained above), does not enjoy "*absolute* immunity" from claims of defamation. *McDonald*, 472 US at 480-85, 105 S Ct at 2789-91. "[D]efamation actions are unique because they involve an individual's right to the protection of a good name," *Azzar v Primebank, F.S.B.*, 198 Mich App 512, 518; 499 NW2d 793, 797 (1993) (citing *Gertz v Robert Welch, Inc.*, 418 US 323, 341; 94 S Ct 2997, 3008; 41 L Ed 2d 789 (1974)); as such, the state has a "traditional concern and responsibility ... to protect its citizens against defamatory attacks," *Linn v United Plant Guard Workers of America*, 383 US 53, 57-58; 86 S Ct 657, 660; 15 L Ed 2d 582 (1966). The state's interest, however, is sufficiently "overriding" only to "protect[] its residents from *malicious* libels." *Linn*, 383 US at 61, 86 S Ct at 662. Thus, while "*knowingly and maliciously* made allegations in petitions to government are not protected under the First Amendment from liability for defamation," *Azzar*, 198 Mich App at 518; 499 NW2d at 797 (citing *McDonald*, 472 US 479; 105 S Ct 2787; 86 L Ed 2d 384), merely *negligent* defamation remains immune from liability under the Petition Clause.

The Supreme Court has twice approved the application of the *New York Times Co. v Sullivan* actual-malice standard to defamation lawsuits arising from petitioning activity. In *White v Nicholls*, 44 US (3 How) 266; 11 L Ed 591 (1845), the defendants argued that they were absolutely immune from defamation liability for statements made in letters sent to the President and other federal

officials requesting the removal of the plaintiff as the Georgetown collector of customs. The Supreme Court rejected the defendants' assertions of absolute immunity, but held that the defendants' letters to the President and other officials nonetheless were "privileged communications," thus "remov[ing] the regular and usual presumption of malice" applicable in ordinary defamation lawsuits and "mak[ing] it incumbent on the party complaining to *show* malice." *Id.* at 286-87. The Court concluded

> that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority ...; and that *proof of express malice* in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding, libellous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. [*Id.* at 291.]

Thus the Court in *White*, while rejecting *absolute* immunity from defamation claims for petitioning activity, nonetheless imposed *qualified* immunity from such claims by requiring "proof of express malice" for liability to attach.

One hundred and forty-five years after its decision in *White*, the Court reaffirmed that holding in the remarkably similar case *McDonald v Smith*, 472 US 479; 105 S Ct 2787; 86 L Ed 2d 384 (1985). The plaintiff in *McDonald* filed defamation claims against a citizen who had sent letters to the President and other federal officials opposing his appointment as a United States Attorney. Again the defendant argued that his petitioning activities were entitled to absolute immunity from defamation liability; and again the Court, while rejecting that assertion, approved a qualified immunity standard that required proof of actual malice. *McDonald*, 472 US at 485; 105 S Ct at 2791.

The Supreme Court, then, has twice endorsed the application to petitioning activity of the actual-malice standard of *New York Times Co. v Sullivan* (or its old-fashioned equivalent in *White*, "express malice"). That standard, of course, requires proof that the defendant made an allegedly defamatory statement "with *knowledge* that it was false or with *reckless disregard* of whether it was false or not." *New York Times*, 376 US at 279-80; 84 S Ct 726. The Court of Appeals in the instant case thus was correct in holding that the trial court should have inquired whether Appellees' false statements to the Wayne City Council were knowingly or recklessly false—thus giving rise to defamation liability—or only negligently so, thus precluding liability.

The Court of Appeals also was correct to avoid the misreading of the *White* and *McDonald* decisions that compromised a decision by another panel of that court in an earlier case, *Hodgins Kennels, Inc. v Durbin*, 170 Mich App 474, 483-85; 429 NW2d 189, 194-95 (1988), *rev'd in part on other grounds*, 432 Mich 894; 438 NW2d 247 (1989).[28] Both *White* and *McDonald* involved plaintiffs who, under the standard of *New York Times* and its progeny, qualified as public officials or public figures. See *New York Times*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (establishing actual-malice standard for defamation of public officials); *Curtis Publishing Co. v Butts*, 388 US 130; 87 S Ct 1975; 18 L Ed 2d 1094 (1967) (applying actual-malice standard to "public figures"). As such, under *New York Times*, the plaintiffs in *White* and *McDonald* would have had to prove actual malice to establish defamation liability even if the defendants' false statements had not been specially protected by the Petition Clause. Contrary to the *Hodgins* court's erroneous interpretation,

[28] Yet another panel of the Court of Appeals, however, correctly interpreted the *White* and *McDonald* decisions in *Azzar v Primebank, F.S.B.*, 198 Mich App 512, 518-19; 499 NW2d 793, 797 (1993).

however, this does not mean that a plaintiff who is *not* a public official or public figure therefore need *not* prove actual malice in a Petition Clause case. Rather, as the reasoning of the *McDonald* decision makes clear, the actual-malice standard applies to *all* petitioning activity, regardless of the plaintiff's status.

In *McDonald*, the Court recognized that the "right to petition ... is implicit in '[t]he very idea of government, republican in form,'" *McDonald*, 472 US at 482, 105 S Ct 2789 (quoting *United States v Cruikshank*, 92 US (2 Otto) 542, 552, 23 L Ed 588 (1876)), and that "the values in the right of petition as an important aspect of self-government are beyond question," *McDonald*, 472 US at 483; 105 S Ct at 2790. Because "[t]he right to petition is cut from the same cloth as the other guarantees of [the First] Amendment," *McDonald*, 472 US at 482; 105 S Ct at 2789, and because it "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble," *McDonald*, 472 US at 485; 105 S Ct at 2791, the Court concluded that "there is no sound basis for granting *greater* constitutional protection to statements made in a petition ... than other First Amendment expressions," *id.*

As the context of the *McDonald* decision demonstrates, however, this conclusion meant only that petitioning activity is not entitled to "an '*absolute and unqualified* immunity'" from defamation liability, *McDonald*, 472 US at 483; 105 S Ct at 2790 (citation omitted)—*not* that petitioning activity is entirely *unprotected* against such liability. "Other First Amendment expressions" directed toward government conduct—namely, expressions that are critical of government officials or other public figures—are, pursuant to *New York Times Co. v Sullivan*, protected by a qualified immunity from

defamation liability in the form of the actual-malice standard. The Court held in *McDonald* that "there is no sound basis for granting *greater* constitutional protection" to petitioning expression than to the kind of expression protected by *New York Times*. *McDonald*, 472 US at 485; 105 S Ct at 2791. But the Court also made clear that there is no basis for granting *lesser* constitutional protection to petitioning activity. As Justice Brennan noted in concurrence, "It necessarily follows that expression falling within the scope of the Petition Clause, *while fully protected by the actual-malice standard* set forth in *New York Times Co. v Sullivan*, is not shielded by an *absolute* privilege." *McDonald*, 472 US at 490; 105 S Ct at 2794 (Brennan, J., concurring).

Thus the *McDonald* Court, while denying absolute immunity from defamation liability for petitioning activity, nonetheless approved the rule of qualified immunity borrowed, by analogy, from *New York Times*. Indeed, the Court in *McDonald* expressly reaffirmed its *White* decision (see *McDonald*, 472 US at 484; 105 S Ct at 2790)—which, as explained above, imposed an "express malice" requirement, the functional equivalent of the modern actual-malice standard. The Court also expressly approved the state-law "malice" standard applicable to the defendant's conduct in that case, which "has been defined by the Court of Appeals of North Carolina[] in terms ... consistent with *New York Times*." *McDonald*, 472 US at 485; 105 S Ct at 2791.

It is important to remember, moreover, that the Court's *White* decision was rendered in 1845, almost 120 years before the Court, in *New York Times*, imposed the actual-malice standard as a constitutional requirement in defamation lawsuits brought by public officials. The *White* Court's imposition of the "express malice" standard, then, could not have turned on the fact that the plaintiff

in that case was a public official; a plaintiff's status as a public official simply was not yet relevant to defamation lawsuits in 1845. Indeed, the Court's reasoning in *White* emphasized not the fact that the plaintiff held an official position, but rather the fact that the defendant's statements took place "before ... the appropriate authority for redressing the grievance represented to it" and thus were "privileged." *White*, 44 US at 291. The *White* decision, in other words, turned on the *context* in which the defendant's statements were made (petitioning activity), not on the status of the *target* of those statements (as a public official). As such, in expressly reaffirming *White* in its more recent *McDonald* decision (see *McDonald*, 472 US at 484; 105 S Ct at 2790), the Court effectively endorsed the application of the actual-malice standard to *all* petitioning activity that takes place "before ... the appropriate authority," quite regardless of the identity of the plaintiff.

This conclusion—that *all* petitioning activity is qualifiedly privileged against defamation liability under the actual malice standard, regardless of its target—flows both from the special importance of the Petition Clause and from the overall logic of the Court's decision in *New York Times*. The *New York Times* decision was built upon "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment," *New York Times*, 376 US at 269; 84 S Ct at 720, a proposition reflecting "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"—even where that debate is "vehement, caustic, and sometimes unpleasantly sharp," *New York Times*, 376 US at 270; 84 S Ct at 721. As the Court held in *New York Times*, this fundamental proposition requires a rule of qualified immunity for criticism of public officials and public figures. And, as the *White* and

McDonald decisions make clear, the same proposition also requires an analogous rule of qualified immunity for *petitioning* of public officials—activity that is, virtually by definition, precisely the kind of "expression upon public questions," *New York Times*, 376 US at 269; 84 S Ct at 720, that the *New York Times* doctrine is designed to protect.

This conclusion is reinforced by imagining the consequences of a contrary rule. Under *New York Times*, a defendant who expresses his or her opinion on a public issue *outside* the legislative chamber—and, in so doing, defames a public official or public figure—cannot be held liable for defamation unless his or her statements are shown to have been malicious. If petitioning activity were not subject to qualified immunity from defamation claims, however, a defendant *could* be held liable for expressing his or her opinion on a public issue *inside* the legislative chamber, in statements directed *to* the legislature—even if any defamation caused by those statements was merely negligent. Such a consequence would be anomalous, to say the least. If qualified immunity for statements *about* public officials is necessary "'to assure unfettered interchange of ideas for the bringing about of political and social changes,'" *New York Times*, 376 US at 269; 84 S Ct at 720 (quoting *Roth v United States*, 354 US 476, 484; 77 S Ct 1304, 1308; 1 L Ed 2d 1498 (1957)), then surely qualified immunity for statements *to* public officials is necessary to serve the same ideal.

Indeed, as the Court in *New York Times* noted (see *New York Times*, 376 US at 282-83, 84 S Ct at 727), public officials in every state are *themselves* protected from defamation liability for their official conduct unless actual malice can be proved. It would be incoherent, the *New York Times* Court pointed out, to encourage "fearless, vigorous, and effective" discussions of public policy

by insulating public officials from unqualified liability, while frustrating those same goals by exposing citizens to unqualified liability for criticizing public officials. *Id.* The same incoherence would result from exposing citizens to unqualified liability for *petitioning* public officials. In our system, after all, "'[t]he people, not the government, possess the absolute sovereignty.'" *New York Times*, 376 US at 274, 84 S Ct at 723 (quoting James Madison). If our representatives are protected from liability for acting upon the wishes of the people, then surely the people themselves must be protected from liability for making their wishes known.

The straightforward implications of the Supreme Court's holdings in *White* and *McDonald*, then—not to mention the fundamental logic beneath the political freedoms protected by the First Amendment—require the recognition of qualified immunity from defamation liability for statements made by citizens while petitioning their government. The Court of Appeals was correct to hold that the *New York Times* actual-malice standard must be applied to such statements.

CONCLUSION AND RELIEF SOUGHT

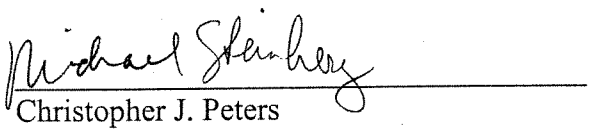
"[T]he right to petition the Government requires stringent protection." *McDonald v Smith*, 472 US 479, 486, 105 S Ct 2787, 2791 (1985) (Brennan, J., concurring). That requirement means that a citizen's conduct while petitioning the government is absolutely immune, under the *Noerr-Pennington* doctrine, from non-defamation liability for tort claims, including claims of tortious interference with a business expectancy. Where, as here, a defendant's activities are "genuinely aimed at procuring favorable government action," *City of Columbia v Omni Outdoor Advertising, Inc.*, 499 US 365, 380; 111 S Ct 1344, 1354 (1991) (Scalia, J., for the Court)—and where, moreover, they are successful in doing so—punishing those activities would be "obviously peculiar in a democracy," *City of Columbia*, 499 US at 379; 111 S Ct at 1353. This is so whether or not the resulting government action is in some way "commercial" in nature, for "[i]t is undisputed that the first amendment protects efforts to influence officials making essentially commercial decisions," *In re Airport Car Rental Antitrust Litigation*, 693 F2d 84, 87 (9th Cir 1982), as well as essentially "political" ones—a line that, in any case, is practically impossible to draw.

The requirement of stringent protection of the petition right means also that, in defamation cases, a citizen's statements made while petitioning the government are qualifiedly immune from liability: The plaintiff must prove *actual malice*, not merely negligence, in order to recover. See *White v Nicholls*, 44 US (3 How) 266; 11 L Ed 591 (1845); *McDonald v Smith*, 472 US 479; 105 S Ct 2787; 86 L Ed 2d 384 (1985). A contrary rule—besides flying in the face of the *White* and *McDonald* decisions—would stifle the "unfettered interchange of ideas for the bringing about of

political and social changes desired by the people," *New York Times Co. v Sullivan*, 376 US 254, 269; 84 S Ct 710, 720 (1964), that is the hallmark of a representative democracy.

For these reasons, the American Civil Liberties Union Fund of Michigan, as *amicus curiae*, respectfully requests that this Honorable Court *affirm* the decision of the Court of Appeals dismissing Appellant's tortious interference claim and remanding its defamation claim for a reevaluation of the evidence on the issue of actual malice.

Respectfully submitted,



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DATED: August 19, 2002